

**COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY**

**RE: PETITION OF THE CAPE LIGHT COMPACT FOR
EXTENSION OF ITS MUNICIPAL AGGREGATION
DEFAULT SERVICE PILOT PROJECT**

DTE 03-____

**PETITION OF THE CAPE LIGHT COMPACT FOR EXTENSION OF ITS
MUNICIPAL AGGREGATION DEFAULT SERVICE PILOT PROJECT
UNTIL DECEMBER 31, 2004 AND APPROVAL OF 2004 PILOT ELECTRIC
SUPPLY AGREEMENT**

I. INTRODUCTION

1. The Cape Light Compact (the “Compact”) hereby submits to the Department of Telecommunications and Energy (the “Department”) a Petition for Extension of its Municipal Aggregation Default Service Pilot Project Until December 31, 2004 and Approval of 2004 Pilot Electric Supply Agreement (the “Petition”) for approval pursuant to St. 1997, c. 164, §339.

2. Chapter 164, Section 339 of the Acts of 1997 gives the Department broad authority to establish pilot projects for municipal aggregators, stating “[n]otwithstanding any general or special law, rule, or regulation to the contrary, the department of telecommunications and energy and the division of energy resources shall establish a pilot program to implement the provisions of section 134 of chapter 164 of the General Laws.” St. 1997, c. 164, §339.

3. The Department approved the Compact’s municipal aggregation Default Service Pilot Project (“Pilot Project”) by letter dated October 23, 2001, as well as in its November 20, 2001 Order on Motion for Reconsideration, both in DTE 01-63. See Letter to Jeffrey Bernstein, October 23, 2001, DTE 01-63 (hereinafter “Approval

Letter”); Order on Motion for Reconsideration, November 20, 2001, DTE 01-63 (hereinafter “Reconsideration Order”).

4. The Department also approved the Compact’s existing Pilot Electric Supply Agreement (“ESA”) with Mirant Americas Retail Energy Marketing, LP (“Mirant”) on March 22, 2002. See DTE 01-63.

5. In DTE 01-63, the Department approved an initial fifteen-month term for the Pilot Project. See Approval Letter; Reconsideration Order; March 22, 2002 approval of Pilot ESA, DTE 01-63.

6. On June 2, 2003, the Compact filed a petition with the Department for an extension of the Pilot Project until December 31, 2003. On July 15, 2003, the Department approved the extension until December 31, 2003. DTE 03-61. The program has thus been operating continuously since May 2002.

7. In its initial filing on the Pilot Project with the Department, the Compact stated that it “will execute an agreement with the supplier for the aforementioned 15 month period, *or for a longer period if such supply is available on terms that provide consumer savings.*” (Emphasis added.) See Default Service Pilot Project Plan, August 15, 2001, DTE 01-63, p. 3. The Department’s Approval Letter also acknowledged that the Compact “may seek Department approval to extend the term of the Pilot Project, depending on the success of the Project in its initial term.” See Approval Letter, p. 3.

8. In fact, as a result of market conditions, the Compact sought for and did receive an extension of the Pilot Project until the end of this year. DTE 03-61.

9. Combined savings for Cape and Vineyard consumers during 2002 and 2003 under the Pilot Project total approximately \$4.7 million. Extension of the Pilot

Project will continue savings for consumers in 2004. Projected savings for continuation of the Pilot Project through 2004 are approximately \$1 million.

10. The Compact and Mirant entered into a new contract, the 2004 Pilot Electric Supply Agreement (“2004 ESA”), on October 15, 2003 for the provision of an all-requirements retail electric supply by Mirant for the default service customers within the municipalities who are members of the Compact, pursuant to the Pilot Project. The 2004 ESA contains virtually identical terms as in the current ESA, except as set forth in Paragraph 11, below. See Exhibit A. Under the 2004 ESA, Mirant will price all generation at 5.651 cents/kilowatt hour until December 31, 2004. (Similar to the initial Pilot Project, the Compact has the ability to add a one mill/kilowatt hour to contribute to a Reserve Fund; the Compact reserves the right to reduce or eliminate this adder.) Consistent with the terms of DTE 01-63, the Compact will terminate the 2004 ESA if the rate offered by Mirant exceeds the NSTAR Default Service fixed price.

11. The 2004 ESA makes a few changes as compared to the current ESA, none of which materially affect the Compact’s ability to conduct the Pilot in 2004 and benefit consumers and competitive markets, should this Petition be granted. There are four basic areas which differ:

First, the 2004 ESA updates the responsibilities of the parties to reflect the fact that the broad-scale consumer notification that was required prior to the Pilot’s commencement has already occurred and certain other start-up tasks need not be repeated.

Second, it changes the term and other dates while clarifying (but not substantively changing) the circumstances in which one party or the other could terminate the contract.

Third, it drops the optional green power option (which has not come to fruition), as the Compact may pursue this separately or as part of a NSTAR Green-Up or similar program.

Finally, recognizing Mirant's changed financial status (see Paragraphs 12-14 below), it relies on the Reserve Fund and insurance as financial sureties for nonperformance rather than parent guarantees or letters of credit which Mirant cannot provide at this time.¹

12. On July 14, 2003, Mirant filed a voluntary petition for relief under Chapter 11 of the United States Bankruptcy Code (Case No. 03-46590) and the case is currently pending in U.S. Bankruptcy Court, Northern District of Texas, Fort Worth Division.

13. Despite the July filing, Mirant continues to conduct its normal course of business in New England and elsewhere around the country.

14. Additionally, as of early September 2003, the various Mirant Debtor entities collectively possessed approximately \$855 million in unencumbered cash (with non-debtor affiliates possessing approximately \$255 million of additional unencumbered cash). These entities have moved to obtain secured debtor-in-possession financing in the amount of \$500 million, and the hearing on the motion was scheduled for October 15, 2003. The Bankruptcy Court has ruled that the Mirant entities are administratively solvent, and they are performing all of their obligations on a post-petition basis. Further, the Bankruptcy Court has entered an order authorizing the Debtors to continue to engage in trading activities. See Exhibit B, Letter dated October 15, 2003, of Mirant Americas

¹ Additionally, the Compact has \$200,000 in its Reserve Fund under the current ESA, all of which could be used to find an alternative supplier or otherwise mitigate the impact of a failure of Mirant to perform under the 2004 ESA.

Retail Energy Marketing, LP, John L. O’Neal, Vice President and Chief Commercial Officer.

15. Finally, it should be noted that Mirant as of this date is the *only* competitive retail supplier that has successfully implemented service to any class of consumers served by the Compact (or by any other opt-out aggregator in Massachusetts); the Compact has had an extremely successful and beneficial relationship with Mirant to date.

16. As the Department found in DTE 01-63 and implicitly considered again in 03-61,² the continuation of the Pilot Project is “consistent with both the specific objective of G.L. c. 164, § 134, to promote municipal aggregation, and the objective of the Electric Restructuring Act, to achieve the benefits of competition in generation service.”

Approval Letter, p. 5. Extension of the Pilot Project for another year -- 2004 -- continues to introduce consumers to choice and promotes the competitive market, especially given the paucity of options for these consumers if the Pilot is discontinued. It also provides a benefit in terms of consumer understanding and familiarity with the same power supply option that they have gotten used to over the last several years; the impact of switching tens of thousands of Cape and Vineyard consumers back to Default Service would likely be significantly negative.

17. Earlier this year, the Department noted that “there are few competitive options” in Massachusetts for residential and small commercial and industrial (“C&I”) customers. See Order, DTE 02-40-B, April 24, 2003, p. 7. In fact, the Compact is the only opt-out aggregator which has been successful in bringing the benefits of the

² The Department approved the Compact’s request for an extension without any separate written order or decision.

competitive market to residential and small C&I customers (and one of only a few successful aggregators serving this market on any basis). The Department also endorsed again the municipal aggregation model as “the simplest and best approach” for bringing the benefits of the competitive market to small customers. See Order, DTE 02-40-B, April 24, 2003, p. 32. Therefore, the extension of the Compact’s Pilot Project will continue to provide a model for other municipal aggregation efforts in the future.

18. Despite the passage of time, the Pilot Project still serves its original purposes: 1) to serve as a bridge between consumers and the competitive retail market; and 2) to identify and remove barriers between competitive suppliers and the distribution company. The need for these two functions clearly still exists in the Massachusetts generation market. This is amply evidenced by the Compact’s recent experience with an RFP for municipal load earlier this fall. The Compact received *no* retail bids for this load. Additionally, conversations with other retail suppliers for both the municipal and default load indicate a marked lack of interest in the retail market for the type of consumers served by the Pilot at this time.

19. As documented in the Compact’s report to the DTE last March, see March 18, 2003 Cape Light Compact Pilot Project Report to DOER and DTE in DTE 01-63, the Pilot has proved invaluable in the identification and removal of barriers to the competitive supply market. In addition, the Compact’s approximately 52,000 customers on competitive power supply represent nearly 60% of the total number of customers in the Commonwealth that have migrated from default supply.³ Examples of remaining barriers include the methodology for pricing default and standard offer price, and

³ As of July 2003 DOER Migration Data reports 87,100 customers statewide were served through competitive generation (http://www.state.ma.us/doer/pub_info/migrate.htm).

consolidated billing issues. Continuing the Pilot provides valuable information towards identifying and resolving these and other barriers.

II. OVERVIEW OF THE FILING

20. The Compact is submitting the following documents with this Petition:

- a. 2004 ESA between the Compact and Mirant (Exhibit A); and
- b. Letter dated October 15, 2003 of Mirant Americas Retail Energy

Marketing, LP, John L. O'Neal, Vice President and Chief Commercial Officer (Exhibit B).

21. Pursuant to 220 C.M.R. 1.10(3), the Compact also requests the Department to take administrative notice of and incorporate by reference in this docket the March 18, 2003 Cape Light Compact Pilot Project Report to DOER and DTE and the Memorandum on Standard of Review and Procedures Concerning the Petition of the Cape Light Compact for Extension of its Municipal Aggregation Default Service Pilot Project in DTE 03-61 dated June 2, 2003.⁴ The Report amply supports many of the points set forth in this Petition; the June 2, 2003 Memorandum on Standard of Review applies with equal force to this proceeding and the Compact accordingly is not submitting a new memorandum of law restating the same points.

III. REQUESTED PROCEDURES TO REVIEW THIS FILING

22. The Compact requests an expedited review of this Petition because the current term of the Pilot Project expires December 31, 2003 and the Compact needs a

⁴ The Compact is not providing copies of these two documents with this filing, but would be happy to do so to the Department or any interested person.

minimum of one month's notice to prepare either to continue or terminate the Pilot Project. Therefore, the Compact respectfully requests that the Department approve the extension of the Pilot Project by November 24, 2003.

23. Expedited review is appropriate with regard to this Petition because the material terms and conditions of the 2004 ESA with Mirant are substantially similar to the terms of the current ESA between the Compact and Mirant. Additionally, given the fact that there are no alternatives to Default Service for these consumers in this time period, the failure to conduct such an expedited review would require the customers to be switched back to Default, even if it were subsequently determined that continuation of the Pilot would provide savings and other benefits. Therefore, the Department should review this Petition to determine if extension of the Pilot Project and approval of the new 2004 ESA are consistent with the Department's prior orders of approval in DTE 01-63 and 03-61.

24. Accordingly, the Compact requests that approval of this Petition is best accomplished through direct service of the dockets in DTE 01-63 and 03-61, followed by a brief comment period and expedited Department review. The Compact once again submits that a hearing, order of notice, or adjudicatory proceeding is inappropriate given the nature of the Petition and the need for accelerated consideration and decision.

IV. PRAYER FOR RELIEF

25. Wherefore, the Compact respectfully requests that the Department approve this Petition to allow the extension of its municipal aggregation Default Service Pilot Project until December 31, 2004 and the accompanying 2004 ESA between the Compact and Mirant.

Respectfully submitted,
THE CAPE LIGHT COMPACT

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